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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 580

CENTRAL HIDE & RENDERING CO., A PARTNERSHIP,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

E. E. BLAKELY,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Your petitioner, Central Hide & Rendering Co., by and through its attorney, E. E. Blakely, respectfully prays for a writ of certiorari, directed to the United States Court of Claims, to review a final judgment of that Court, rendered in this action on December 4, 1951.

Opinion Below

The opinion of the United States Court of Claims is unreported to date.

Jurisdiction

The jurisdiction of this court is invoked under Act of February 13, 1925, as amended by Act of May 22, 1939, as

further amended by 28 U. S. C. 1255, effective September 1, 1948.

Question Presented

Where the United States Court of Claims failed to make any findings on the ultimate questions of fact, upon which the rights of the parties depended, such as is the situation in the present case, but merely made incomplete findings as to the subsidiary circumstantial facts, which have a bearing upon but which are not decisive of the only ultimate questions of fact in this case, raised by the second amended petition (R. pp. 1-10), and respondent's general traverse (R. 19), namely, were the contracts in suit breached by respondent, and if so how much were the damages; and where respondent's responsible officers, charged with the administration of the contracts admitted that the contracts in fact had been breached, and sought through every reasonable means to secure an adjustment through administrative action, and gave testimony on behalf of petitioner to this effect, and where all other responsible officers in position to have personal knowledge, gave testimony favorable to petitioner, the question arises: *Can a judgment against petitioner under such circumstances be supported where there was also a complete failure by the United States Court of Claims to make findings of the ultimate facts on the only issues in suit?*

Statement of the Case

The report of the Commissioner of the United States Court of Claims, as modified by petitioner's exceptions and substitutions, discloses the following pertinent facts:

a. The Central Hide & Rendering Co., is a partnership consisting of J. Franke Bass and Carl F. Tichter. At all times material to the claim in suit, petitioner was engaged in the rendering, processing and sale of animal by-products,

consisting of hides, greases, and meat and bone scrap. The principal place of business was located in Wichita Falls, Texas. Prior to July 1, 1944, petitioner had fully performed some 23 earlier contracts with respondent's salvage contracting officers in the Eighth Service Command. All of these contracts were satisfactorily fulfilled and petitioner realized reasonable profits from their performance.

During May and June 1944, petitioner entered into eleven contracts for the purchase of food waste and salvage at many of the same camps in the Eighth Service Command where earlier contracts were then fully performed or substantially so. The contracts are identified and fully described and the amounts claimed for the breach of each contract are fully set forth in second amended petition (R. pp. 1-10), and finding No. 2 (R. 20).

b. The contracts were prepared on QMC Form No. 327, entitled "Invitation Bid and Acceptance Sale of Waste Material (Negotiated Contract)," with a continuation schedule (QMC Form No. 327 A), describing the classifications of materials, generally, as follows:

Item No.	Article and Description
1.	Cooked grease, both clear and rough, including spent frying fats.
2.	Bones and raw meat trimmings, spoiled meats (will consist of meat trimmings, cooked bones, cracklings, poultry heads, feet and entrails).
3.	Trap grease from interceptors (treated) (untreated)[1]
4.	Kitchen waste fit for animal food, excluding greases, bones, and raw meat trimmings.

[1]Delete one.

Some of the contracts merely described the No. 2 materials as "Bones and raw meat trimmings." In nearly all of the supplemental agreements the No. 2 materials were described as "Raw bones and Raw meat trimmings."

There is no controversy with respect to the greases deliv-

ered under items 1 and 3. Petitioner's complaint is that instead of delivering the materials described under item 2 of the continuation schedules "as is" and "where is," as provided for in the contracts, such materials had been rendered of all of their valuable greases and proteins in such a manner by the camps, prior to delivery to petitioner, as to deprive petitioner of the values in recoverable by-products. Further, the worthless residue from such rendering, done pursuant to directives from respondent, as will be seen below, deprived petitioner of nearly all the value in recoverable by-products that had been reasonably expected.[1] That is to say, instead of petitioner getting what was contracted for, it was compelled to incur tremendous expense to remove huge quantities of worthless residue to avoid the creation of a public nuisance that would have endangered the health of the troops stationed at the camps.

c. Early in 1942 Lt. Colonel Edward F. Wilson was assigned to Headquarters, Eighth Service Command, as Assistant Quartermaster. Later on, Colonel Wilson was made Director, Salvage and Redistribution Division, and placed in charge of the disposal of all surplus property and of supervising all salvage activities throughout the Command. Although Colonel Wilson was not the contracting officer under any of the contracts in suit, they were approved by his office for the Commanding General and he was charged with their administration by War Department and Service Command directives.

About the last week of April 1944, Colonel Wilson invited petitioner's partners to come to Headquarters, Eighth Service Command, for the purpose of negotiating new con-

[1] The Commanding General, Fourth Army informed the War Department as follows: "It should be borne in mind that when these materials are cooked for rendering [Pursuant to Food Service Letter No. 6, page 7 below,] as indicated in Par. 1 above, the glycerin and tallow contents of the same is greatly reduced and the material value of the products are corresponding reduced. . . ." (P. Ex. No. 17.)

tracts at most of the same camps where petitioner had received earlier contracts, to become effective with the 1945 fiscal year commencing July 1, 1944. Petitioner was particularly desirous that the language of the Continuation Schedule describing items Nos. 2 and 4 be clarified. Due to the loose manner in which the items were described under the old contracts, there had been continuing disputes and controversies between petitioner's pick-up truck drivers and those of the contractors for No. 4 materials as to which type of contractor was entitled to a very small amount of cooked materials. The amounts of these cooked materials were so small as to be of little consequence, Colonel Wilson estimated that they never exceeded from one to five per cent of the deliveries under the old contracts. Petitioner was not greatly concerned, except for the fact that since the continuation schedule of the No. 4 materials did not contain the language excluding other materials, which appears in the continuation schedule quoted from above, this incomplete language was used as a pretext for the diversion of substantial quantities of valuable materials, other than cooked bones, which petitioner was entitled to. Colonel Wilson testified that he favored the clarification of the continuation schedule in the contract negotiations, as outlined above, because it would increase the production of critically needed by-products for the War Effort and that such changes in the continuation schedule were not intended as notice to petitioner that the Government was going into the rendering business in competition with private rendering contractors (Tr. 382 *et seq.*).

d. The finished by-products from rendering were in critical short supply throughout World War II. Meat and bone scrap was urgently needed to augment the supply of chicken and hog feed and dry rendered tankage was used in the manufacture of fertilizer. While the greases were the principal sources of glycerin, an indispensable component in

the manufacture of explosives. Numerous directives were received by Headquarters, Eighth Service Command, from the War Department emphasizing the critical need for increasing the production of these items.

As the need for these by-products became progressively more acute, with the progress of the War, the War Department intensified its efforts to increase the flow of these by-products into private industry concerned with the War Effort. To achieve this purpose, sometime in 1943 supervision of all salvage and salvage disposal functions were transferred from the Quartermaster General to Headquarters, Army Service Forces, The War Department. Colonel C. R. Van Etten was placed in direct charge of all food waste and salvage, that is, the collection, segregation, classification, and disposal of these materials. While feeding and subsistence of the Army, the activity that produced food waste and salvage remained under the jurisdiction of the Food Service Department of the Quartermaster Corps (R. pp. 29-30). Late in April 1944, the War Department published a consolidation of the various memoranda and directives Colonel Van Etten had been instrumental in preparing on the subject of collection, classification, segregation, and disposal of food waste and salvage by contracts with private renderers in W/D Technical Manual 38-505 (P. Ex. No. 31). Subsequently, on March 29, 1944, Colonel Wilson prepared a letter of instructions to all salvage contracting officers directing the early negotiation and award of contracts for the disposal of salvage materials, "due to the increasing importance of these products in the War Effort." Colonel Wilson also directed that the camps make every effort to secure *contracts which are just and equitable*, and which, based upon the best information available, will utilize the materials sold to the best advantage in the War Effort (Finding 7, R. pp. 25-7).

c. In the spring of 1944, the Quartermaster General de-

termined that "due to the monetary savings to be realized, it is essential that a program for the proper handling and rendering of excess fats be instituted and energetically followed at your station" (Finding 10, R. pp. 29-30). Suets and fats had already been authorized for inclusion in petitioner's contracts by W/D Technical Manual 38-505 (See P. Ex. No. 31, above). The excess materials referred to in Food Service Letter No. 6, were the same materials that Colonel Wilson had already directed salvage contracting officers to dispose of by contract to private renderers (Finding 10, R. 30). Neither Colonel Wilson nor petitioner's partners were aware of the issuance of Food Service Letter No. 6, nor the measures contemplated by it (R. 33). The letter also directed that the suets and fats be ground into small particles and the fats and proteins boiled out in copper kettles (Scheumack, Tr. 576). The effectiveness of compliance with the letter was simply amazing to Colonel Wilson[2] (Tr. 391). The rendering done by the camps, pursuant to Food Service Letter No. 6, was so effective that the substance remaining from it was no more than worthless meat and bone residue, "absolutely devoid of any substantial value."

f. When Food Service Letter No. 6 and Colonel Wilson's letter of March 29, 1944, were received at headquarters of the respective camps, they were classified RESTRICTED.[3] Consequently, salvage and contracting officers or other

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[2] Colonel Wilson's testimony as to the extent of rendering may be summarized as follows: "I was aware that there would be some rendering in the kitchens (of edible suets and fats for securing butter and lard substitutes,) but I was not aware that we were going to render everying *period*." (Tr. 418.)

[3] It is a statutory requirement that all RESTRICTED military publications bear the following: NOTICE: This document contains information affecting the National Defense of the United States within the meaning of the Espionage Act, 50 U. S. C. 31 and 32, as amended. Its transmission or relevation of its contents in any manner to an unauthorized person is prohibited by law.

camp personnel were prohibited from showing them to partners of petitioner or of making their contents known to them (R. 33).

g. Only one official charged with execution of the rendering program pursuant to Food Service No. 6 was called to give testimony for respondent. This official was Major Bynum, former salvage officer at Camp Bowie (Tr. pp. 555-56). After hearing Major Bynum's testimony, respondent did not call other salvage officers having personal knowledge of the rendering program.[4]

h. The Tyler, Texas, rendering plant of petitioner rendered the materials received from Camp Fannin. The salvage officer at this camp was not cognizant of the fact that the 1945 fiscal year contract provided for the payment for cooked materials. Accordingly, such materials continued to be segregated and were not charged for if delivered to petitioner. Only 1,870 pounds of No. 2 materials were weighed and charged for during the period from July 1, through December 31, 1944. There was no substantial increase in such deliveries until April 1945. Whereas, during the six months prior to July 1944, the petitioner had collected 20,697 pounds of No. 2 materials from Camp Fannin (Finding 14, R. pp. 34-35). Thus, these figures clearly indicate that respondent was rendering something over ninety per cent of the No. 2 materials that petitioner reasonably expected to receive.

For a short time after the contracts had been accepted by respondent and after petitioner had made bonds with satisfactory corporate sureties, guaranteeing the faithful performance of all of the terms and conditions of the contracts,

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[4] Major Bynum testified: "There were two classes of bones disposed of at this collection point, bones that had been used for soups or cut out of roasts, but when they started the German prisoner of war camp, the Germans being a thrifty race, would turn over bones to us that looked almost bleached." Tr. 556.

the quality of the materials were substantially the same as those formerly received under the old contracts (Finding 15, R. 35). The only difference noted after July 1, 1944, until about July 15th to August 1st,[5] was that the small amount of cooked materials, estimated by Colonel Wilson and petitioner to have been about from one to five per cent, and never exceeding ten per cent, were included in the materials weighed and paid for, except, of course, the deliveries from Camp Fannin, as noted above.

i. Petitioner immediately protested to Colonel Wilson and asked for a hearing in Colonel Wilson's office. Colonel Wilson informed petitioner that he would investigate the matter and if the facts seemed to justify such a hearing he would grant it at a later date.[6] The investigation made by Colonel Wilson convinced him of the justness of petitioner's protests. He immediately sought authority in Headquarters, Eighth Service Command, for the cancellation, adjustment or renegotiation of the contracts. When he failed to secure such authority, Colonel Wilson immediately presented the matter to Colonel Van Etten. Later on, Colonel Van Etten was sent by the War Department to Headquarters, Eighth Service Command, for the purpose of attempt-

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[5] It is obvious that the opinion of the Court of Claims is based upon a palpable and serious misconception of the facts. It is stated: ". . . *the decisive fact in the case is that at all the camps where plaintiffs had had contracts, the quality of the materials delivered to plaintiffs after July 1, 1944,* the effective date of the new contracts, *was substantially the same quality of the materials deliverd under the old contracts.*" (Emphasis supplied.) The Court fails to point out the all important fact that this condition of the materials obtained for only about two weeks . . . Or until petitioner had gone so far there was no turning back without serious consequences.

[6] The contracts contained no Delays-Damages or Disputes Articles requiring the contracting officers to investigate the complaints, ascertain the true facts, and to make findings thereon. This accounts for the fact that the contracting officers had no opportunity to acquire such personal knowledge of the situation that would enable them to give the testimony that they did.

ing to work out some practicable solution to the cancellation, adjustment or renegotiation of the contracts. However, the legal authorities of the War Department stated that there was no such authority.[7] The quality of the No. 2 deliveries steadily deteriorated as the camps became more proficient in the rendering pursuant to Food Service Letter No. 6, and as the short supply of by-products became progressively more acute. Colonel Wilson did not authorize the contracting officers to terminate the contracts because he recognized the fact that it would be impossible to induce other renderers to remove the worthless residue under any conditions (Finding 17, R. 37).

j. Petitioner's books and records show that the total claim for the breaches of the contracts in suit is the sum of $169,781.85. The computations from petitioner's books and records on which the net claim is based were checked and verified against yield and production indices for the entire rendering industry.[8]

Specification of Errors to Be Urged

The United States Court of Claims erred:

1. In failing to make findings of fact as to the material issues of the case, *i.e.*, whether or not the contracts in suit were breached by respondent, and if so, how much were the damages.

2. In failing to find that the contracting officers did not have anything to do with actual deliveries of materials under the contracts and that in the absence of such oppor-

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[7] Colonel Van Etten testified: "That the camps themselves had gone into the rendering business after having given out rendering contracts, and it was destroying their value. They took the cream off, and they [the petitioner,] got the skimmed milk; they got the refuse after the fats had been extracted." (Tr. 146.)

[8] Doctor Snyder, the respondent's expert, testified that the figures petitioner used from the rendering industry were considered so reliable that he used them in his teaching at Texas A. & M. College. Tr. 606.

tunity to see and inspect the materials they did not have such personal knowledge of the precise facts of the case to give the testimony that they did give.

3. In failing to make any findings of fact as to the amount of damages, although the Commissioner did recommend some damages and all of his recommendations as to such primary facts that the contracts were breached, were adopted by the court without substantial change.

4. In failing to find that the respondent delivered residue from rendering done by the camps in accordance with Food Service Letter No. 6, instead of No. 2 materials "as is" and "where is," as provided by the contracts, constituted breaches of the contracts entitling petitioner to substantial damages.

5. In failing to find that each of the eleven contracts, identified and referred to in second amended petition (R. pp. 1-10), was breached and that the damages due to such breaches are as set forth under each separate cause of action.

6. In failing to find that the aggregate amount of damages for the breach of the eleven contracts in suit was $169,781.85.

7. In entering judgment against petitioner.

Reasons for Granting the Writ

The United States Court of Claims made no findings on the only real issues in suit. The second amended petition alleges that each of the eleven contracts was breached, in that the respondent delivered worthless residue, from rendering done by the camps, instead of the materials described by the contracts (R. pp. 1-10). The respondent put in issue every allegation of the second amended petition by its general traverse (R. 19). The special findings of fact may not be aided by statements in the opinion of the court. *United States* v. *Esenault-Pelterie*, 299 U. S. 159. In any event, the

statements in the conclusion and the opinion of the court are of dubious validity, since they are based upon the testimony of the contracting officers, which was largely hearsay.[9]

Findings on ultimate questions of fact, upon which the rights of the parties depend are an indispensable requisite to support a final judgment. *Botany Worsted Mills* v. *United States*, 278 U. S. 282.

In *United States* v. *Penn Foundry Co.*, 337 U. S. 198, this court reversed the Court of Claims for failing to make findings on all "material issues." The court said, "We are bound by the foregoing findings in testing the court's conclusions of law and judgment." But failure to make findings on all material issues raised by the petition and respondent's general traverse will not sustain a judgment. *United States* v. *Causby*, 328 U. S. 256; *United States* v. *Seminole Nation*, 299 U. S. 417; *United States* v. *Esenault-Pelterie*, *supra*; *Crocker* v. *United States*, 240 U. S. 74; *Stone* v. *United States*, 164 U. S. 380. Or where the findings are ambiguous, contradictory or silent in respect of a material matter, the case may and should be remanded for corrected findings. *Lukenbach S. S. Co.* v. *United States*, 272 U. S. 533.

The United States Court of claims failed to make any findings as to the amount of damages, although the Commissioner's report recommended "at least $15,430.55" (Findings 30 and 31, R. pp. 52-54). In arriving at this figure, however, the Commissioner made serious errors in his computations which are at variance with sound accounting practice. The petitioner has shown even under the Commis-

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[9] Contracting officers were vague and illusory on the all important subject of the deterioration of the materials, "any information I could volunteer would be from the food service officer." Deere, Camp Bowie. "I had nothing to do with the food conservation officer . . . I didn't have any connection with him whatever." Bynum, Camp Bowie, Effect of Food Service Letter No. 6, "I don't know." McLaughlin, Camp Barkeley, and so on with each one.

sioner's erroneous computations this figure should be $115,472.99 (P. Ex. to Com. Rep. R. below, pp. 79-81).

This Court has reversed the Court of Claims time after time for the failure to make findings of the ultimate facts, on all material issues, raised by the petition in that court and the Government's general traverse. See *United States v. Penn Foundry Co., supra,* and the cases cited therein. Yet despite these recent decisions and the definite mandates of this Court, the Court of Claims has again entered a final judgment against petitioner without making findings of the ultimate facts upon which the rights of the parties rest, and in such a manner as to depart from the accepted and usual course of judicial proceedings and to such an extent as to call for the exercise of this court's power of supervision. (See par. 5 (b) of Rule 38 and par. 3 of Rule 41.)

Conclusion

It is respectfully submitted that the weight of the evidence is contrary to the conclusions arrived at by the United States Court of Claims. And furthermore, the reason that no findings of fact were made on the real issues is due to the fact that there was no personal knowledge testimony that would support findings and a judgment against petitioner, therefore certiorari should be granted.

Respectfully submitted,

E. E. Blakely,
Attorney for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 580

CENTRAL HIDE AND RENDERING CO., *Petitioner*

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Claims

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 70-76) is not yet reported.

JURISDICTION

The judgment of the Court of Claims (R. 76) was entered on December 4, 1951. The petition for a writ of certiorari was filed on February 11, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether, in an action arising from an alleged failure of goods sold by the United States to conform to the contracts of sale, where the Court entered findings of fact that the goods did not substantially deviate from the contracts and a conclusion of law that petitioner could not recover, the omission of an express statement from the findings of fact that the contracts were not broken constitutes reversible error.

RULE INVOLVED

Rule 41(1) of the Rules of this Court provides in part:

> A petition to this court for a writ of certiorari to review a judgment of the Court of Claims shall be accompanied by a certified transcript of the record in that court, consisting of the pleadings, findings of fact, conclusions of law, judgment and opinion of the court, and such other parts of the record as are material to the errors assigned * * *.

STATEMENT[1]

In May and June, 1944, petitioner entered into contracts (R. 11-18) to remove waste materials

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[1] The facts are stated as set forth in the Court of Claims' special findings, unless otherwise indicated. The reference "F" designates the finding number; "R.," the record page; and "Tr.," the page in the Transcript of Testimony filed with the clerk, to which reference may be made, as the parties have stipulated (R. 77).

from the kitchens of eleven Army camps in the Eighth Service Command (F. 2, R. 55-56). Under the contracts petitioner paid for these materials at fixed prices per pound, and it used them for rendering into grease and other animal by-products at four rendering plants in Texas (F. 1, R. 54-55). The contracts contained so-called continuation schedules, which, although particular contracts occasionally varied slightly, generally classified the materials to be removed in three groups: (1) cooked grease; (2) "bones and raw meat trimmings, spoiled meats (will consist of meat trimmings, cooked bones, cracklings, poultry heads, feet, and entrails)"; and (3) trap grease (F. 3, R. 56). The dispute centered around item 2, petitioner complaining that much of the material delivered to it under this item had been rendered by the Army camps before delivery, making its value less than petitioner had anticipated (R. 6; F. 3, R. 56).

The Army had issued a directive in letter form from the Quartermaster's Office of the Eighth Service Command in pursuance of a salvage program designed to save grease and fats valuable in the production of glycerine for materiel of war (F. 8, 9, R. 61-62). The letter suggested that the various camps render the waste before delivery either by cooking in the individual kitchens or by setting up central plants at each camp (F. 9, R. 62); one camp adopted the latter course and all

the rest the former (F. 9, R. 63). Some rendering had always been done at the camps, and the effect of the directive was only that of a step in a progressively tightening program (*ibid.*).

This directive was issued at about the time petitioner was negotiating for the present contracts, but its contents were not made known to petitioner (F. 11, R. 65). Petitioner had had some seventeen previous contracts with a number of the same camps, and the last of these contracts were to expire in June, 1944 (F. 5, R. 58). The present contracts were negotiated as renewals, or as extensions to new camps. Each of the new contracts was made with respect to an individual camp, but all of them were negotiated under the supervision of one Colonel Wilson, Director of the Division of Salvage and Redistribution of the Eighth Service Command (F. 7, R. 59). Colonel Wilson issued uniform instructions to the contracting officers (F. 7, R. 59) and also dealt in person with the petitioner about certain changes in the new contracts from the old (F. 10, R. 63).

The changes discussed with Colonel Wilson included a discussion of the now disputed item 2. Under the old contracts cooked bones had not been included in any of the four items classified under the salvage regulations. Petitioner was sometimes given cooked bones free and sometimes not. These cooked bones were apparently profitable to it if received free but not if paid for, for it was the raw

bones and trimmings that provided the largest output of by-products. The new item 2 was altered to include these cooked bones, requiring payment for them. (R. 16; F. 10, R. 63-64.)

Under the new contracts, effective July 1, 1944, petitioner continued its collections. The item-2 materials at some of the camps began to include larger ratios of cooked bones to the total than formerly (F. 12, R. 65-66), and in September petitioner first made a formal complaint of this situation (F. 13, R. 66). At the same time, however, although the program of rendering before delivery was under way in at least some camps, it does not appear to have been effective in reducing the value of the rendered materials.[2] A substantial amount of recoverable by-products remained in the rendered materials (F. 10, R. 64) and there was no substantial change in the quality of the uncooked materials delivered, either at the one camp which had a central rendering plant (F. 9, R. 63), or at the camps which did kitchen rendering (F. 12, R. 66).

Petitioner continued to sustain losses, however; and when its claim was disallowed, it brought this suit (F. 17, R. 69-70). The theory of its case was that it had come to rely on its experience under the old contracts as to the amount of recoverable by-products per pound and that the Army's institu-

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[2] Cooked bones are to be distinguished from rendered material, which was sometimes called cracklings (F. 10, R. 64).

tion of the pre-rendering program, without notifying it, constituted a breach of the new contracts. The court made its special findings of fact (R. 54-70), setting forth the above situation, and entered a conclusion of law (R. 70) that plaintiffs were not entitled to recover. It made no express "finding of fact" that the contracts were not broken; nor, of course, did it make any finding of damages, having held that no recovery could be had.

The court based its decision primarily on the ground that since the facts showed that there was no change in quality of the material after the institution of the rendering program, there was no basis for petitioner's claim of misrepresentation (R. 75-76). It also held that petitioner's complaint based on the increase in the proportion of cooked bones was unfounded because the contracts expressly provided for cooked bones (R. 72) and that the presence of the term "cracklings" in item 2 put petitioner on notice that some of the material would be pre-rendered (R. 74).

ARGUMENT

The decision of the court below turned on the particular facts of this case; and the findings made by the court, which are supported by substantial evidence, are sufficiently complete without more to compel the conclusion that the contracts were not breached and that petitioner was not entitled to recover. There is, therefore, no merit in petition-

er's attempt to give the case a broad significance by contending that the court violated long-standing rules relating to findings of fact.

Petitioner points to no finding which should have been made and was not, except to suggest (Spec. of Err. 1, 4, 5) that there should have been a finding of the "ultimate fact" that there was no breach of contract.[3] Petitioner correctly states the rule, based on the theory that the Court of Claims' special findings of fact are like a special verdict (*e.g., Luckenbach S.S. Co.* v. *United States,* 272 U.S. 533, 539), that the findings must include so-called "ultimate facts" which are really like conclusions of law. Cf. *e.g., United States* v. *Esnault-Pelterie,* 299 U.S. 201, 205; *Botany Mills* v. *United States,* 278 U.S. 282, 290. But we think that this case clearly falls within the corollary of this rule that "the absence of the finding of an ultimate fact does not require a reversal of the judgment if the circumstantial facts as found are such that the ultimate fact follows from them as a necessary inference." *United States* v. *Wells,* 283 U.S. 102, 120; see, *e.g., United States* v. *Esnault-*

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[3] Petitioner also refers to a failure to make findings of damages (Spec. of Err. 3, 6); but obviously, since the court held that petitioner could not recover, no such finding is necessary or meaningful.

The other findings which petitioner contends were omitted (Spec. of Err. 2) will be seen to relate not to any of the findings of circumstantial fact required by law (see, *e.g., United States* v. *Pugh,* 99 U.S. 265, 270) but to the competency of evidence. See *infra,* fn. 5, p. 9.

Pelterie, supra, at 205; *Botany Mills* v. *United States, supra,* at 290.

Here the special findings compel the inference that there was no breach of contract. Petitioner's case below was based on the theory that it was misled by the Government as to the proportions in which the various item-2 waste materials would appear in the goods delivered to it. Examination of the findings, however, reveals clearly that petitioner could not reasonably have been misled. The findings show that its losses mainly stemmed not, as it claimed, from the institution without its knowledge of the program for rendering fats before delivery but from the increased proportion of cooked bones sold to it under the new contracts. See F. 12, 13, R. 65-67. But petitioner cannot contend that it was misled as to this item by any lack of knowledge, for the negotiations on the new contracts expressly dealt with the inclusion of cooked bones, and the parties intended that petitioner should pay for these. See F. 11, R. 64.

There was no warranty that the materials sold would include cooked bones in any particular proportion. The contract expressly disclaimed warranties by providing that sales should be "as is" and "where is" (R. 12).[4] Since there was no mis-

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[4] It is established that, under the analogy of the special findings to a special verdict, reference may be made to the pleadings in aid of the findings. See *Luckenbach S.S. Co.* v. *United States,* 278 U.S. 533, 539. The contract is set forth in the pleadings.

representation, this disclaimer obviates petitioner's contention that its past experience entitled it to hold the Government to a warranty of particular quality. Compare *Snyder Corp.* v. *United States,* 68 C. Cls. 667, with *Harris Bros. Co.* v. *United States,* 61 C. Cls. 445. Moreover, the entire nature of the contract is such as to obviate any implied warranty or agreement that cooked bones would be limited to a maximum proportion of the total. The contract was not simply a sale to petitioner; it was also an undertaking by petitioner to remove whatever material the kitchens might have on hand—a waste disposal undertaking. Obviously, the Government did not agree to provide a particular quality or quantity of waste.

As to the effect of the undisclosed Army rendering program, the court below found it unnecessary to determine whether the absence of disclosure vitiated the express disclaimer of warranty. This conclusion was based squarely on the special findings that the quality of the rendered material did not substantially change under the new contracts. See F. 9, 12, R. 63, 66. These findings were clearly supported by substantial evidence (see Tr. 546, 555-556, 668, 681, 709, 714, 716-717),[5] and nothing

[5] Petitioner suggests that some of the testimony on which these findings were based was hearsay. However, there is adequate additional competent testimony. Also petitioner did not object to the evidence at the hearing, so the objection is waived. See 1 Wigmore, *Evidence* § 18.

else in the special findings is to the contrary. It does appear that the Army's food conservation program was progressively tightened (F. 11, R. 65), but it does not appear that the directive of which petitioner complains produced any appreciable results beyond what had already been done under the old contracts.

But in any event, the contract's express disclaimer of warranty was effective, for while petitioner was unaware of the pre-rendering program, there was no misrepresentation on the part of the Government. See 3 Williston, *Sales* (rev. ed.) § 631.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL, 1952.

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In The

Supreme Court of the United States

October Term, 1951

No. 580

Central Hide & Rendering Co., A Partnership,
Petitioner,

vs.

The United States

On Petition for a Writ of Certiorari to the United States Court of Claims

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REPLY BRIEF FOR PETITIONER IN SUPPORT THEREOF

THE ISSUE INVOLVED

Certiorari should be granted in this case because the Court of Claims failed to make adequate findings of fact upon the main issues in suit. Such failure not only is contrary to the rules of that court, but is contrary to the Acts of Congress on the subject and a long line of well established decisions by this court, holding that a judgment of the Court of Claims may not be supported in the absence of adequate findings upon *every material*

issue. United States v. *Penn Foundry Co.*, 337 U. S. 198, decided 1949. Certiorari should be granted for the further reason that the findings on the subsidiary circumstantial facts are so inadequate and deficient, that there is no basis for ascertaining, as a matter of law, that the contracts were not in fact breached.

RESTATEMENT OF THE QUESTION PRESENTED

Can a judgment by the Court of Claims against petitioner be upheld, where that court failed to make findings of the ultimate facts on every material issue, required to support a judgment, but also failed to make such findings of the subsidiary circumstantial facts, upon which the inference might reasonably be drawn, as to the ultimate facts of whether the contracts in suit were breached, and if so, how much are the damages.

ARGUMENT

No principle of law is more firmly established or frequently adhered to than that holding that a judgment in the Court of Claims is in the nature of a special verdict and cannot be enlarged or diminished and cannot be sustained unless supported by special findings of fact which extend to all material issues. *United States* v. *Esenault-Pelterie*, 299 U. S. 201, particularly page 205. Also see *United States* v. *Causby*, 328 U. S. 256, particularly the cases cited and discussed near bottom of page 267.

The Government has also cited most of these cases, which of course, hold contrary to its position in the present case. The Government, however, has studiously avoided any reference to the latest expression of this

court on this precise question in the case of *United States* v. *Penn Foundry Co., supra.*[1]

The case of *United States* v. *Wells*, 283 U. S. 102, cited by respondent, is not in point. In fact, this case is in substantiation rather than contradiction to the often repeated and well founded rule, referred to above. If, in fact, the Wells case has any application at all to the issues in the instant case, it is in support of petitioner's position. In any event, the Wells case is not an exception to the rule, but reaffirms and substantiates the rule that the circumstantial facts as found, must be such, that the ultimate facts necessary to support a judgment, must necessarily follow them as a logical conclusion. Such is not the case here. In the present case, the circumstantial subsidiary facts set forth in the court's special findings are completely inadequate. Because they do not cover every material issue raised by the petition and respondent's general traverse. (R. pp. 1-19.)

CONCLUSION

For the reasons outlined above, it is respectfully submitted that petition for certiorari should be granted.

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Attorney for Petitioner.

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[1] It is indeed interesting to compare the inconsistencies of the Government's position in the present case, with respect to the requirement of adequate findings on *every material issue*, with the reasoning it urged in support of certiorari in the Penn Foundry case. In that case, of course, "the shoe was on the other foot," so to speak.